No. 87-1489 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES C. TRENTON, SR., FREDERICK A. RINGBLOOM, HARRY G. BARLOW, and EARL L. OWENS, individually and on behalf of the class of employees of SCOTT PAPER COMPANY excluded from participation in the Highly Accelerated Retirement Program,
Petitioners,

v.

SCOTT PAPER COMPANY and RETIREMENT BOARD OF SCOTT PAPER COMPANY SALARIED EMPLOYEES RETIREMENT PLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The only question as to which the petition presents argument in favor of certiorari review may be properly stated as follows:

Where it is acknowledged that an employer enjoys the statutory right (under ERISA) to design its pension plan so as to advance the employer's business interests and be consistent with its available resources—and where an employer, seeking to induce the early retirement of certain excess employees (in order to increase efficiency), designs an amendment to its plan so as to provide extra early retirement benefits for selected employees without depriving its remaining employees of any of their pre-existing pension rights—may such remaining employees properly bring suit under ERISA to compel the employer to offer extra early retirement benefits to all employees uniformly, without regard to the employer's business needs and resources?

PARTIES TO THE PROCEEDINGS

The names of all parties in the district court and the court of appeals are listed in the caption. Respondent Scott Paper Company has the following publicly held subsidiary or affiliated companies: Scott Paper Ltd. (Canada) and Compañia Industrial de San Cristóbal, S.A. (Mexico).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE [1]

1. Respondent Scott Paper Company ("Scott") has long maintained a number of employee benefit plans, including its basic retirement plan for salaried per-

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[1] With some hesitation respondents feel obliged to caution the Court as to the factual accuracy of petitioners' "Statement of the Case." It is devoid of record references and contains substantial errors. See notes 2, 13 *infra*.

sonnel, the "Scott Salaried Employees Retirement Plan" ("SERP"). In 1986, believing that certain of its facilities were over-staffed and that those operations could be rendered more efficient by early voluntary retirements, Scott designed and implemented a new program called the "Scott Highly Accelerated Retirement Program" ("SHARP") under which salaried employees working at the designated over-staffed locations (and meeting certain age and service requirements) would be entitled to new early retirement benefits not previously available under SERP (App. 27a-29a). Needless to say, since Scott thereby took on an obligation to provide additional funding to support SHARP, this approach to the problem of selectively reducing Scott's work force was more costly to Scott than outright firings would have been, but Scott preferred the more humane SHARP approach.[2] SHARP's benefits were not offered to employees at other company facilities which, not being over-staffed, were already operating efficiently.[3]

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[2] The staff planners at Scott recommended SHARP in preference to outright terminations because SHARP was "the most humane way of getting people to leave" the over-staffed operations. See the joint appendix filed in the court of appeals at 557. The petition is flatly wrong in its repeated assertions (at 4, 5, and 8) that "none" of the "funding for SHARP . . . came from Scott." In fact, all of it came or will come from Scott, the only possible source of such funding.

[3] The SHARP program had the desired result: a substantial number of employees at the over-staffed locations elected to take early retirement, and although Scott will have to shoulder an increase in its retirement funding costs, the net result of the SHARP program will be reduced costs and increased efficiency.

2. Petitioners are four individuals who are or were employed at a Scott facility which was not overstaffed in the relevant period. Accordingly, none of the four petitioners were or are eligible for SHARP's benefits. On the other hand, it was stipulated in the proceedings below that petitioners "have earned benefits under [SERP]" and that "[t]heir accrued benefits and their right to payment of these benefits under [SERP] were not altered in any way by the adoption of SHARP." App. 29a. Since Scott has a clear statutory obligation to keep SERP funded at levels calculated to assure payment of all of petitioners' SERP benefits, 26 U.S.C. § 412, payments made to SHARP beneficiaries can have absolutely no effect on petitioners.

3. In the proceedings below the parties were in agreement as to certain of the legal principles embodied in the relevant statute—the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* First, it was undisputed below that ERISA does not require any employer to establish any particular kind of pension plan. Indeed, the statute leaves an employer free to establish no pension plan at all if it believes it will be able to attract an adequate labor force without such a plan. Conversely, if an employer believes that it would be in its own self-interest to establish a pension plan, it is entitled to "design" the plan (subject to certain statutory requirements not relevant here) so as to conform to its own business needs and resources. Thus it can "design" the benefits to be conferred on particular employees in such a way as to make the total financial demands of the plan "affordable" by

the employer.[4] By hypothesis, an employer will establish and fund a plan only if it considers the plan to be in its own business interests.

Once an employer-designed plan has been created, it is managed or administered by a trustee or "administrator" who receives the necessary funding from the employer, manages the assets, and distributes the benefits to those entitled to receive them. Thus the "design" and the "administration" of such a plan involve quite separate responsibilities and are subject to different standards of judicial review. In their briefs in the proceedings below petitioners themselves affirmatively recognized that the "courts have no role in deciding whether the *design* of a plan is reasonable or not," citing *Moore* v. *Reynolds Metals Company Retirement Program*, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985).[5] On the other hand, in the proceedings below petitioners

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[4] An alternative to such a "defined benefit plan" (in which benefits are determined under a specified formula) is a "defined contribution plan" under which the employer commits itself to make specified levels of contributions. The amount of the contributions plus earnings, if any, then determines the amount of pension or other benefits to be provided. Such a plan may leave it to the plan's trustees or administrators to determine who should receive what benefits and the amount of those benefits in light of the available assets. See Sinai Hospital of Baltimore, Inc. v. National Benefit Fund of Hospital & Health Care Employees, 697 F.2d 562 (4th Cir. 1982); Struble v. New Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325 (3d Cir. 1984).

[5] The quoted language (to which we have added emphasis) is from petitioners' brief in opposition to respondents' motion to dismiss the Complaint in the district court below. The same language was brought to the attention of the court of appeals below in respondents' brief at pp. 2, 23.

emphasized—and respondents did not dispute—that under ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), those responsible for the "management" or "administration" of a pension plan are by definition "fiduciaries" with fiduciary obligations to the plan's beneficiaries—which means that, if there is a judicial challenge to a plan administrator's decision with respect to the management or administration of the plan's assets, the reviewing court is authorized to determine whether there has been a breach of any fiduciary duty. For present purposes the decisively significant ERISA principle to which all parties seem to agree is (in the words of the responsible enforcement agency, the U.S. Department of Labor [6]) that "decisions relating to the establishment, termination and *design* of [pension] plans . . . are not fiduciary activities subject to Title I of ERISA." [7]

4. Following implementation of the SHARP program, petitioners brought suit in the U.S. District Court for the Eastern District of Pennsylvania against Scott and the administrator of SERP and SHARP

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[6] The quoted language appears in an official Labor Department letter intended for publication. 12 BNA Pension Rep. 472-73 (Mar. 17, 1986) (emphasis added).

[7] See *Moore, supra,* citing UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982); Sutton v. Weirton Steel Division, 567 F. Supp. 1184 (N.D. W. Va.), *aff'd,* 724 F.2d 406 (4th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984). The petition's first "Question Presented" begs the question by referring to the "dispos[al] of pension trust assets" without distinguishing between administration and design. The former function is admittedly "subject to common law and ERISA fiduciary duties," while a design decision (as petitioners concede) is not.

(the respondent "Scott Retirement Board"), seeking (in effect) a ruling that one or the other or both of the respondents had a legal duty to make SHARP's early retirement benefits available on a uniform basis to all salaried Scott employees regardless of location. The theory of liability, which has been gradually changing since suit was filed, appears to be that in implementing SHARP Scott caused pension fund assets (repeatedly described as "surplus assets") to be "used" for Scott's "own purposes" and that this "use" of the assets by Scott violated a fiduciary obligation imposed by ERISA. Pet. at 9-13. The notion seems to be that, once Scott has handed over funds to the plan administrator, they are thenceforth "someone else's money" (Pet. at 12) and that Scott had no right to require that funds contributed by Scott be used in aid of a retirement program which was admittedly designed to benefit the company by enhancing its efficiency.

The case was submitted on stipulated facts (supplemented by the deposition testimony of three Scott executives) on cross-motions for summary judgment. The district court concluded that "[i]n view of the parties' stipulation of facts" the case involved "no genuine issues of material fact" and that "summary disposition" would be appropriate (App. 32a). The court then held that the "fiduciary duties" arising from ERISA are not operative when an employer makes "decisions regarding which business units should be included in a retirement program" and dismissed petitioner's basic ERISA claims on that ground (App. 37a). Petitioners having advanced an additional claim that they had a "private cause of action" to remedy an alleged pension plan "top heaviness" in violation of Title II of ERISA, the court

dismissed the claim on the ground that it had not been timely raised (App. 38a), and it dismissed a claim of age discrimination on the ground, *inter alia*, that in fact there had been no discrimination based upon age (*id.*).[8]

5. The Court of Appeals for the Third Circuit unanimously affirmed, emphasizing that petitioners were complaining only of a "design decision" falling outside the fiduciary requirements of ERISA (App 9a). The court also emphasized that petitioners' "rights under SERP" were in no way decreased by the establishment of the SHARP program and hence that petitioners had suffered no injury from any improper diversion of funds (App. 10a). The court recognized that SHARP had conferred upon Scott an "indirect benefit of enhanced efficiency" but pointed out that nothing in ERISA renders "such consequential benefit . . . impermissible" (*id.*). As to petitioners' remaining claims, the court of appeals did not disturb the district court's decision that petitioners' "top heaviness" claim was not "appropriately before the district court" (App. 12a), and it agreed with the district court's factual conclusion that petitioners had not shown any discrimination based on age (*id.* at 13a).

Thereafter petitioners sought rehearing. On December 4, 1987, an order was entered denying both

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[8] Having disposed of all of petitioners' federal claims, the district court exercised its discretion to dismiss certain state claims without prejudice on the authority of United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966). The petition does not purport to seek review of the latter discretionary ruling (which was affirmed by the court of appeals, App. 13a-14a).

rehearing by the panel and rehearing *en banc* (App. 1a-2a).

SUMMARY OF ARGUMENT

The petition presents no question worthy of review. The petition is incorrect in asserting that the ERISA issue decided below has been previously decided by other circuits in a conflicting manner. In each of the allegedly conflicting decisions the administrator of an ERISA pension plan had decided to use pension plan funds in a way which would have directly benefitted the employer *and* reduced the future benefits of the complaining employees, thus violating the administrator's fiduciary duty to the latter. Here, by contrast, the only challenged decision was an employer's non-fiduciary "design" decision which did not in any way adversely affect the complaining employees (*i.e.*, petitioners).

Although the petition argues in effect that the courts below established an "important" precedent by authorizing an employer to "use" pension plan funds for its own direct benefit, in fact all such funds are being and will continue to be used exclusively for the payment of benefits to the beneficiaries entitled thereto, including these petitioners, whose pension rights remain totally unaffected by anything done by respondents in this case.

The remaining issues as to which review is sought are unique to the present dispute and thus unworthy of review.

ARGUMENT

I. THE DECISIONS BELOW DO NOT CONFLICT WITH ANY DECISION IN ANY CIRCUIT[9]

In arguing that the decisions below conflict with certain decisions in the Second and Fourth Circuits —and, indeed, with certain decisions of the Third Circuit itself—petitioners cite cases in which administrators or trustees of a pension plan have attempted to use plan funds for the direct benefit of the employer at the expense of plan beneficiaries. In the case upon which petitioners principally rely, *Donovan* v. *Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982), the trustees of a pension plan (who also happened to be officers of the employer company) made a decision as to how to invest Plan assets—a decision to which a fiduciary obligation clearly attached—and decided to invest the funds in a way calculated to help the employer fight off a hostile take-over but not to protect the assets invested for the benefit of the Plan beneficiaries. Since the investment decision was thus not focussed, as it should have been, solely on the welfare of the Plan beneficiaries, the Second Circuit (per Friendly, J.) concluded that the decision had violated the trustees' fiduciary duties under ERISA.

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[9] The petition asserts that this Court's decision in NLRB v. Amax Coal Co., 453 U.S. 322 (1981), stands for the principle that ERISA "incorporate[s] the common law of trusts" (Pet. at 10) and that the decisions below are "contrary" to that principle (*id.*, at 9). But *Amax* in no way suggests that pension plan design decisions involve trust or fiduciary responsibilities, and this Court's decision in UMWA Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982), is generally interpreted as holding that they do not. *Moore, supra*, 740 F.2d at 456.

This case, by contrast, involves only an employer's "design" decision which petitioners acknowledge to be of a non-fiduciary character (see pp. 3-5, *supra*), and it has been stipulated that the decision in no way affected petitioners' SERP benefits.

Equally far afield is *Sinai Hospital of Baltimore, Inc.* v. *National Benefit Fund of Hospital & Health Care Employees*, 697 F.2d 562 (4th Cir. 1982), involving a multi-employer welfare benefits plan under which the employers' contribution levels had been defined but the design of the benefits had been delegated to trustees, thus requiring that the benefits be determined pursuant to normal fiduciary standards.[10] The employers then attempted to cause the trustees to exercise their discretion, not to maximize the benefits to be received by the beneficiaries, but actually to reduce such benefits (and the employers' future contributions), and again the court refused to allow the Plan beneficiaries to lose benefits in direct contravention of the trustees' fiduciary obligations. In the instant case, again, the challenged design decision of the employer was not fiduciary, and petitioners agree that they suffered no loss of benefits thereby.

Finally, the petition suggests that the decision of the Third Circuit below conflicts with the same Circuit's decision in *Struble* v. *New Jersey Brewery Employees Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984) (Pet. 11), but the suggestion is plainly wrong. *Struble* involved essentially the same institutional arrangement as that involved in *Sinai*, *supra*; the challenged conduct even more clearly violated applicable standards; and the case is thus even

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[10] See note 4, *supra*.

more distinguishable than *Sinai*. Moreover, the *Struble* opinion was written by the same judge who authored the decision in the present case (Seitz, J.), and although petitioners below heavily emphasized *Sinai* and *Struble* in their arguments to Judge Seitz and his colleagues, it is obvious that the court could perceive no conflict between their conclusion in this case and the rulings in either *Struble* or *Sinai*.[11]

The reality is that the unanimous four-judge rulings below involve no conflict with earlier precedent.[12]

II. NONE OF THE "IMPORTANT ISSUES" SUGGESTED IN THE PETITION ARE IN FACT PRESENTED

The first asserted "reason for granting the writ" is that this case allegedly presents the "important" issue of whether ERISA permits an employer "to use" pension plan funds "for its own purposes" (Pet. 9). On the facts stipulated by the parties below, however, Scott did not "use" any pension plan assets "for its own purposes" except in the sense that *every* employer with an ERISA pension plan "uses"

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[11] In Deak v. Masters, Mates & Pilots Pension Plan, 821 F.2d 572 (11th Cir. 1987), also cited by petitioners (Pet. at 11), the question again was whether trustees had committed a breach of their fiduciary duties, and the case is thus as distinguishable as *Sinai* and *Struble*.

[12] The only known precedent, a district court decision, fully supports the rulings below. Ogden v. Michigan Bell Telephone Co., 657 F. Supp. 328, 336 (E.D. Mich. 1987) (where employer decided to institute early retirement program to achieve "force reductions," the decision was "a business decision not governed by the fiduciary standard of ERISA"). The petition's suggestion that there may be additional cases pending in certain Federal districts which may involve similar issues and from which some future conflict may arise (Pet. at 12) is based on pure speculation.

the plan's assets for its own benefit. Indeed, as previously noted, if the fact that a pension plan furthers the business interests of the employer were sufficient to give rise to a violation of ERISA, no pension plan could ever be established under the statute.

The petition also suggests (at 10) that the result reached below is "contrary to the spirit of the law" because it will encourage "employers to get rid of employees," thus lightening the future burdens of the pension plan and creating "a surplus which the employer can then use at its sole and unfettered discretion." That is simply incorrect. The departure of Scott employees for whatever reason (through resignation, firing, or early retirement) may reduce the company's payroll and in that sense create funds for Scott's "use," but the creation of SHARP created no Plan "surplus;" quite the contrary, because the contribution obligations previously undertaken by Scott are not sufficient to fund both SERP and SHARP, the creation of SHARP has required Scott to take on new and higher contribution obligations for the future.[13] In the last analysis the essential facts are (a) that all contributions can be used only for the benefit of Plan beneficiaries (including petitioners) until all Plan liabilities are satisfied, and (b) that the departure of other employees, for whatever reason, can have absolutely no effect on the benefits to be received by petitioners.

Moreover, the principle for which these petitioners seem to be contending—that it is improper for an

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[13] Here again, therefore, the petition is factually wrong in asserting that SHARP is being funded "from surplus assets in SERP" (Pet. at 4) and not with funds "from Scott" (*id.* at 5).

employer to induce early retirements selectively in the interests of enhancing efficiency—would lead to an ironic result: In the future every employer who wanted to achieve such efficiencies would be forced to fire the employees outright, rather than taking the more humane and expensive course of inducing voluntary early retirements through added pension plan benefits.

III. THE REMAINING ISSUES FOR WHICH REVIEW IS SOUGHT, BEING UNIQUE TO THE PRESENT DISPUTE, ARE NOT WORTHY OF CERTIORARI REVIEW

Substantial parts of the petition are devoted to the question of the distribution of authority between Scott and its Retirement Board. Pet. 6-8, 12-14. Those issues can only be resolved (and were resolved below) on the basis of the particular facts of the relationship between Scott and the Board, including the language of the particular legal documents bearing on that relationship. The factual aspects of the relationship were thoroughly reviewed by the four judges below (App. 9a-11a, 16a-19a, 33a-34a), and on that basis all four judges concluded that each of the two respondents, Scott and the Board, had acted in accordance with its authority. Since it is highly unlikely that that resolution could have any precedential value for later cases, the issues involved (including particularly the second and third "Questions Presented" in the petition) are not worthy of review on certiorari.

The same is true of the fourth "Question Presented" on the subject of age discrimination. All four judges below decided that the facts presented by this record do not show that there was discrimi-

nation (in the words of the applicable statute) "because of . . . age," and the petition's one-sentence reference to the matter (Pet. 14) does not even purport to claim a justification for certiorari review. Exactly the same is true of the untimely claim (which was not pleaded below) that there was some problem of "top heaviness" with SHARP.

CONCLUSION

The decision of the court of appeals does not merit review under the standards established by this Court. See Rule 17. It is not in conflict with any other judicial decision, and it involves no issue of any precedential importance. For these reasons the petition should be denied.

Respectfully submitted,

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